Rel: September 30, 2021

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1200366

Ex parte City of Gulf Shores

PETITION FOR WRIT OF MANDAMUS

(In re: Ronald Paulinelli, as father and next friend of Sophia Paulinelli, a minor

v.

City of Gulf Shores)

(Baldwin Circuit Court, CV-19-900718)

BRYAN, Justice.

The City of Gulf Shores ("the City") petitions this Court for a writ of mandamus directing the Baldwin Circuit Court to dismiss tort claims brought against the City. The City contends that the claims are barred by the recreational-use statutes found at § 35-15-1 et seq., Ala. Code 1975. We deny the petition.

In June 2018, Sophia Paulinelli ("Sophia"), who was a minor at the time, was injured while walking on a wooden boardwalk owned by the City. The boardwalk runs over beach property and allows pedestrians to access the public beach from a point slightly south of the intersection of West Beach Boulevard and 13th Street. In addition to owning the boardwalk, the City owns the beach property on which the boardwalk sits. Sophia was walking on the boardwalk behind a man when the man stepped on a board, causing the board to spring up from the boardwalk. The dislodged board had a screw protruding from it, and the board and screw fell on Sophia's foot, impaling the screw in her big toe.

In May 2019, Ronald Paulinelli ("Ronald"), as Sophia's father and next friend, sued the City and fictitiously named defendants. Against the City, Ronald alleged claims of negligence and wantonness. On January

18, 2021, seven weeks before the case was set to go to trial, the City moved for a summary judgment, arguing that it is entitled to immunity under the recreational-use statutes found at § 35-15-1 et seq. Ronald filed a response to the summary-judgment motion, arguing that the recreational-use statutes do not control in this case. In support of his argument, Ronald cited certain cases that we will discuss below. The materials before us do not indicate that the City ever addressed in the circuit court the cases relied on by Ronald. The circuit court denied the summary-judgment motion without explanation, and the City then filed its mandamus petition with this Court.

> "The writ of mandamus is an extraordinary legal remedy. Ex parte Mobile Fixture & Equip. Co., 630 So. 2d 358, 360 (Ala. 1993). Therefore, this Court will not grant mandamus relief unless the petitioner shows: (1) a clear legal right to the order sought; (2) an imperative duty upon the trial court to perform, accompanied by its refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the Court. See Ex parte Wood, 852 So. 2d 705, 708 (Ala. 2002)."

Ex parte Davis, 930 So. 2d 497, 499 (Ala. 2005).

As noted, in moving for a summary judgment, the City argued that it is entitled to immunity under the recreational-use statutes found at §

35-15-1 et seq. The City first cited protections given to landowners allowing recreational use on their lands under Article 1 of the recreational-use statutes, consisting of §§ 35-15-1 through -5, which was enacted in 1965. The City mostly focused, however, on the broad protections given to landowners allowing noncommercial public recreational use on their lands under Article 2, consisting of §§ 35-15-20 through -28, which was enacted in 1981. The City observed that § 35-15-22, Ala. Code 1975, provides:

> "Except as specifically recognized by or provided in this article, an owner of outdoor recreational land who permits non-commercial public recreational use of such land owes no duty of care to inspect or keep such land safe for entry or use by any person for any recreational purpose, or to give warning of a dangerous condition, use, structure, or activity on such land to persons entering for such purposes."

The City further noted that § 35-15-23, Ala. Code 1975, provides:

> "Except as expressly provided in this article, an owner of outdoor recreational land who either invites or permits non-commercial public recreational use of such land does not by invitation or permission thereby:
>
> > "(1) Extend any assurance that the outdoor recreational land is safe for any purpose;

> "(2) Assume responsibility for or incur legal liability for any injury to the person or property owned or controlled by a person as a result of the entry on or use of such land by such person for any recreational purpose; or
>
> "(3) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed."

The City argued that, as the owner of the outdoor recreational land on which Sophia had been injured, it is entitled to immunity under the recreational-use statutes. The City acknowledged that § 35-15-24, Ala. Code 1975, provides an "actual-knowledge" exception to such immunity but argued that there was no evidence indicating that the exception applies here.[1]

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[1]Section 35-15-24 provides, in part:

> "(a) Nothing in this article limits in any way legal liability which otherwise might exist when such owner has actual knowledge:
>
> "(1) That the outdoor recreational land is being used for non-commercial recreational purposes;
>
> "(2) That a condition, use, structure, or activity exists which involves an unreasonable risk

In response to the summary-judgment motion, Ronald argued that the recreational-use statues do not control in this case. Ronald argued that the boardwalk in this case is a "public way," like a sidewalk, that the City has a duty to maintain regardless of the recreational-use statutes. In support of his argument, Ronald cited a series of cases concerning whether a city could be liable for injuries caused by falls on sidewalks located in city parks. Ronald cited City of Birmingham v. Brasher, 359 So. 2d 1153 (Ala. 1978), which involved a plaintiff who tripped and fell on a sidewalk in a city park. In Brasher, this Court concluded that the city

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> of death or serious bodily harm;
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> "(3) That the condition, use, structure, or activity is not apparent to the person or persons using the outdoor recreational land; and
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> "(4) That having this knowledge, the owner chooses not to guard or warn, in disregard of the possible consequences.
>
> "(b) The test set forth in subsection (a) of this section shall exclude constructive knowledge by the owner as a basis of liability and does not create a duty to inspect the outdoor recreational land."

was not immune from a claim alleging that the city had negligently maintained the sidewalk located within the park. The Court in Brasher relied on Walker v. City of Birmingham, 342 So. 2d 321 (Ala. 1976), which Ronald also cited in his response. Noting the "somewhat atypical posture" of the decision in Walker, the Court in Brasher clarified that the actual opinion of the Court in Walker was Justice Bloodworth's opinion concurring specially in that case. 359 So. 2d at 1155. In Walker, Justice Bloodworth concluded that the city should not be immune to tort claims based on the alleged failure to maintain a paved walkway in a public zoo. Justice Bloodworth also stated that he would have overruled Jones v. City of Birmingham, 284 Ala. 276, 224 So. 2d 632 (1969), which also involved a fall in a public park; the Court in Brasher acknowledged that the Court in Walker had in fact overruled Jones through Justice Bloodworth's special writing. The Court in Jones acknowledged that "[a] municipal corporation is liable for injuries suffered due to defects in sidewalks, streets and public ways, where it has not exercised reasonable care." 284 Ala. at 278, 224 So. 2d at 633. However, in concluding that the city in Jones was immune, the Court in that decision noted that "[i]t is also a

well-recognized rule in this state that the maintaining by a municipal corporation of public squares, parks, playgrounds and recreational facilities is a governmental function, and that a city is not liable for injuries which result from the negligent operation of the same." Id.

Brasher and Walker are central to Ronald's argument that the City is not entitled to immunity under the recreational-use statutes.[2] The City argues to this Court that those decisions are not controlling and that it is entitled to immunity under the recreational-use statutes. The applicability of the cases relied on by Ronald is a key issue before us. However, nothing in the materials before us indicates that the City ever presented to the circuit court the arguments that it now presents to us regarding the applicability of those decisions. This Court will not grant relief to a petitioner or an appellant based on an argument presented for the first time to this Court. See State Farm Mut. Auto. Ins. Co. v. Motley,

[2]The City argues that Brasher and Walker predate the adoption of the recreational-use statutes. As noted, Article 1 of the recreational-use statutes, which the City cited in its summary-judgment motion, was passed in 1965, see Act No. 463, Ala. Acts 1965, and Article 2 of the recreational-use statutes, which the City also cited in its summary-judgment motion, was passed in 1981, see Act No. 81-825, Ala. Acts 1981.

909 So. 2d 806, 821 (Ala. 2005) (stating that "[t]his Court cannot consider arguments advanced for the purpose of reversing the judgment of a trial court when those arguments were never presented to the trial court for consideration"); and Ex parte Staats-Sidwell, 16 So. 3d 789, 792 (Ala. 2008) (stating that, "on mandamus review, 'we look only to the factors actually argued before the trial court' " in considering a petitioner's arguments (quoting Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005), citing in turn Ex parte Ebbers, 871 So. 2d 776, 792 (Ala. 2003))).

> "This Court has long held that it 'will not hold a trial court to be in error unless that court has been apprised of its alleged error and has been given the opportunity to act thereon.' Sea Calm Shipping Co. v. Cooks, 565 So. 2d 212, 216 (Ala. 1990) (citing Defore v. Bourjois, Inc., 268 Ala. 228, 105 So. 2d 846 (1958)). This is so, in part, because ' " 'there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right.' " ' Ex parte Elba Gen. Hosp. & Nursing Home, Inc., 828 So. 2d 308, 314 (Ala. 2001) (quoting Cantu v. State, 660 So. 2d 1026, 1031-32 (Ala. 1995) (Maddox, J., concurring in part and dissenting in part), quoting in turn State v. Applegate, 39 Or. App. 17, 21, 591 P.2d 371, 373 (1979) (emphasis omitted))."

Moultrie v. Wall, 172 So. 3d 828, 840 (Ala. 2015).

Thus, we cannot consider the arguments made by the City regarding the applicability of the cases relied on by Ronald in the circuit court.

Accordingly, we deny the City's petition. We express no opinion regarding the merits of Ronald's claims; rather, our decision is based on the City's failure to preserve key arguments before the circuit court.

PETITION DENIED.

Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, and Stewart, JJ., concur.

Mitchell, J., dissents.

MITCHELL, Justice (dissenting).

The majority denies the City of Gulf Shores' petition for a writ of mandamus because, it concludes, the City failed to challenge in the trial court Ronald Paulinelli's argument for why the City was not entitled to summary judgment. For the reasons that follow, I respectfully dissent. The City is clearly right on the merits, and the course of proceedings below does not support the majority's forfeiture holding.

I start with the merits. The City's petition, like its motion for summary judgment below, rests on Alabama's recreational-use statutes. See § 35-15-1 et seq., Ala. Code 1975. Those statutes embody the Legislature's decision to encourage landowners to open their land to the public for outdoor recreational use by limiting their potential tort liability. See § 35-15-20. Relevant here, Article 2 of the recreational-use statutes provides that, "[e]xcept as expressly provided in this article, an owner of outdoor recreational land who either invites or permits non-commercial public recreational use of such land" does not thereby warrant the safety of the land and assumes no liability or duty of care as to anyone entering or using the land "for any recreational purpose." § 35-15-23. "The lone

exception to this rule," set forth in § 35-15-24, kicks in when the owner has actual knowledge of a latent danger and does nothing about it. Ex parte Town of Dauphin Island, 274 So. 3d 237, 248 (Ala. 2018). Absent that knowledge and neglect, the broad limitation of liability in § 35-15-23 governs all cases within its terms, "expressly abrogat[ing] the common law" that would otherwise apply to such cases. Id.

Here, there's no real dispute that the boardwalk on which Paulinelli's child was injured is "outdoor recreational land" devoted to "non-commercial public recreational use," that the City is the land's "owner," or that the child was on the boardwalk for a "recreational purpose," as those key terms are used in Article 2. See § 35-15-21; see also Poole v. City of Gadsden, 541 So. 2d 510, 512-13 (Ala. 1989) (holding it to be "quite obvious" that Article 2 applied to a municipality-owned boardwalk). Nor does anyone argue that the City had actual knowledge of the danger that caused the injury (as needed to trigger Article 2's sole exception). So it would seem clear that Article 2 shields the City from liability and that the City was entitled to summary judgment on that basis.

In opposing summary judgment, Paulinelli advanced just one substantive counterargument: that the City had a duty of care under City of Birmingham v. Brasher, 359 So. 2d 1153 (Ala. 1978), and Walker v. City of Birmingham, 342 So. 2d 321 (Ala. 1976). It's clear why this argument fails. Brasher and Walker concerned municipalities' common-law duties to maintain sidewalks located within public parks. See Brasher, 359 So. 2d at 1154-55. They have nothing at all to do with the recreational-use statutes. Indeed, the article of the recreational-use statutes that is dispositive here, Article 2, was enacted in 1981 and did not even exist when Brasher and Walker were decided. Accordingly, those cases have nothing to do with the City's argument for summary judgment based on the recreational-use statutes and on Article 2 in particular.

The City explains all of this in its mandamus petition. The majority opinion, however, faults the City for not having explained it sooner. It holds that the City may not dispute Paulinelli's "Brasher argument" (as I'll call it for simplicity) in this Court because it did not do so in the trial court. But that holding cannot be squared with the actual course of proceedings below and the forfeiture principles generally applied by courts

of review.[3] This is so for several interlocking yet ultimately independent reasons.

First, it's hard to see when the City's forfeiture occurred. In its motion for summary judgment, the City presented an analytically complete argument for why it should prevail under Article 2 of the recreational-use statutes. Paulinelli then raised the Brasher argument -- for the first time -- in his response to the City's motion. After that, there were no further written submissions from either side; the trial court held

[3]I use the word "forfeiture" here to describe situations where a party is held to have lost the opportunity to raise an issue through failure to do so at the appropriate time. Although courts and litigants often apply the term "waiver" in this context, this kind of inadvertent forfeiture is not a "waiver" in the traditional, strict sense of that word because it is not a knowing and voluntary abandonment of a legal right. See Kontrick v. Ryan, 540 U.S. 443, 458 n.13 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." (cleaned up)); Black's Law Dictionary 1894 (11th ed. 2019) (noting in the definition of "waiver" that "[t]he party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it"); see also United States v. Phillips, 834 F.3d 1176, 1183 (11th Cir. 2016); Korsunskiy v. Gonzales, 461 F.3d 847, 849 (7th Cir. 2006).

a hearing only four days after Paulinelli filed his response, and it denied the motion two days after the hearing.

Obviously, the City had no obligation to specifically anticipate and refute the Brasher argument in its initial summary-judgment motion. Nor can the City be faulted for overlooking the Brasher argument in a later written submission, because there was none. We do not know what was said at the hearing, but that should make no difference, because we do not typically think of oral argument on a briefed motion as either expanding or limiting the set of issues that the parties' written submissions have placed before the court.[4] In short, there is no point in the course of proceedings below at which the City can justly be charged with forfeiting its right to contest the Brasher argument.

Second, the parties' written submissions adequately teed up the merits of the Brasher argument. Although the City's summary-judgment motion did not specifically discuss Brasher and Walker (again, for the

[4]Of course, parties can expressly waive or abandon positions at oral argument, if they choose. But there is nothing to suggest that the City did so here.

obvious reason that Paulinelli had not yet raised the Brasher argument), it unmistakably argued that the recreational-use statutes furnished the only applicable framework and that, within that framework, the actual-knowledge test in § 35-15-24 was the only potential exception to Article 2's no-duty rule. Quoting directly from this Court's opinion in Dauphin Island, 274 So. 3d at 248-49, the City emphasized that Article 2 "completely abrogates" common-law landowner duties in cases where it applies, and that the actual-knowledge test is the "lone exception" within the statutory framework.

This argument and authority were more than enough to apprise the trial court of the City's position on the later-raised Brasher argument. More pointedly, they were enough to apprise the trial court of why that argument is wrong. The Brasher argument can be interpreted in two ways. On one reading, it denies that the Article 2 framework completely preempts other sources of duty in cases where it applies. On the other, it asserts that Brasher and Walker stand for an exception within the Article 2 framework, thus denying that the actual-knowledge test is the only such exception. Either way, the argument fails, and for reasons that

follow directly and transparently from law already explained in the City's summary-judgment motion. Thus, while the City had no obligation to refute the Brasher argument in advance, it effectively did so anyway.

Third, even if the City had not given the trial court everything it needed to understand the Brasher argument's shortcomings, those shortcomings are not a discrete "issue," "question," or "theory" requiring specific preservation. See Ex parte Knox, 201 So. 3d 1213, 1216-18 (Ala. 2015); Ex parte Jenkins, 26 So. 3d 464, 473 n.7 (Ala. 2009); Home Indem. Co. v. Reed Equip. Co., 381 So. 2d 45, 50 (Ala. 1980). "[T]he rule of issue preservation 'generally prevents an appellant [or a petitioner] from raising on appeal [or in a mandamus petition] a question or theory that has not been preserved for appellate review, not the provision to a higher court of an additional specific reason or authority for a theory or position asserted by the party in the lower court.' " Knox, 201 So. 3d at 1216 (quoting Jenkins, 26 So. 3d at 473 n.7); see also Jenkins, 26 So. 3d at 473 n.7 ("In other words, new arguments or authorities may be presented on appeal, although no new questions can be raised." (cleaned up)). Here, the discrete issue before the trial court was whether the City should prevail

under Article 2 of the recreational-use statutes.[5] Within the confines of that issue, the Brasher argument represented Paulinelli's counterargument to the City's affirmative case. The majority opinion thus holds that the City forfeited a counterargument to a counterargument. That slices and dices way too finely.

Finally, at least in federal appellate courts, it is firmly established that "there can be no forfeiture where the [lower] court nevertheless addressed the merits of the issue. When a [lower] court resolves an issue, the losing party can challenge it." Hi-Tech Pharms., Inc. v. HBS Int'l Corp., 910 F.3d 1186, 1194 (11th Cir. 2018) (cleaned up); see also United States v. Williams, 504 U.S. 36, 41-43 (1992). That rule makes sense -- if the lower court reached the merits of an issue, there can be no concern

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[5]Cf. Jenkins, 26 So. 3d at 473 n.7 (defining the preserved "issue" or "question" as whether search warrant described thing to be seized with sufficient particularity, permitting new reasons to be articulated on appeal for why the description was adequate); Home Indem. Co., 381 So. 2d at 50 (defining the preserved "theory" as whether insurance policy extended coverage, permitting appellant to point to new policy language on appeal in support of its position); see also Citizens United v. FEC, 558 U.S. 310, 330-31 (2010) (defining the preserved "claim" as whether campaign-finance statute violated the First Amendment, permitting new argument that contrary precedent should be overruled).

about unfair surprise from the reviewing court doing so too -- and I would apply it here. Although the order denying the City's summary-judgment motion does not give reasons, the only interpretation that is plausible in light of the parties' submissions is that the trial court accepted the Brasher argument. Cf. Fogarty v. Southworth, 953 So. 2d 1225, 1231-32 (Ala. 2006) (presuming that an unexplained summary judgment rests on at least one of the grounds urged by the movant). Accordingly, the City should be permitted to contest the Brasher argument in this Court.

For these reasons, I would grant the City's petition and issue a writ directing the trial court to grant the City's motion for summary judgment.